UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRILL CONCEPTS SERVICES, Inc., d/b/a
THE DAILY GRILL,

Employer,

and **Case No. 31-RC-209589**

UNITE HERE LOCAL 11,

Petitioner.

BRIEF IN SUPPORT OF REVIEW OF REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE

Employer Grill Concepts Services, Inc. dba The Daily Grill ("Daily Grill" or "Employer") submits this brief pursuant Section 102.67(h) of the Board's Rules and Regulations, to assist the Board in its review of the Regional Director's Decision and Certification of Representative. Employer requests that the Board reverse the Regional Director's Decision and Certification of Representative in light of the union's improper conduct which deprived the voting employees of their right to choose, or to not choose, a bargaining representative free from interference and coercion.

I.

INTRODUCTION

Employer requests that the Board overturn the results of this mail ballot election because the union's conduct in visiting employee's homes and offering to "help" them complete their ballots robbed the employees of free choice in the election. As is evidenced by the testimony of the employees themselves, the union's misconduct here had a real and substantial effect on their

votes. Nine of the 76 voting employees complained of the union's conduct. Their complaints were unsolicited by Employer, and brought entirely on the initiative of the complaining employees themselves. Their complaints evidence a widespread campaign by the union to pressure, coerce, and intimidate the voting employees *during the voting period*, which was facilitated by the mail-ballot process that is contrary to the longstanding Board policy favoring manual elections.

The mail ballot election resulted in a vote of 29 to 25 in favor of the union. Seven employees had their mail ballots voided because the return envelope was not signed. At least three employees refused to sign their envelopes for fear that it compromised their anonymity, which fear was stoked by the union's unwelcome home visits. There is no question that the "laboratory conditions" necessary for a valid election were not present for this election. The direct and indisputable evidence, through the complaining employees' contemporaneous written statements and their testimony in the hearing before the Regional Director, establishes that the union's conduct actually interfered with their free choice in the election.

II.

BACKGROUND[1]

The Daily Grill is a restaurant operating within the lobby of the Westin Hotel on Century Boulevard in Los Angeles, near Los Angeles International Airport. The Daily Grill is not affiliated with the Westin Hotel, which a union property organized under Unite Here! Local 11.

In November 2017, Unite Here! Local 11 ("Local 11" or "the union") initiated efforts to organize the hourly non-supervisory employees of the Daily Grill. Local 11 requested an election

[1] Employer provided a comprehensive factual and procedural history of this matter in its Request For Review, which the Board granted, and upon which this brief is based. In the interest of brevity, Employer will not re-state the entire history here, but will instead make reference to and incorporate the facts set forth in its Request For Review. Employer's Exhibits to its Request For Review ("RR") are re-submitted herewith.

by mail ballot, and Employer opposed that request, arguing for a manual election consistent with the Board's longstanding policy that elections should be conducted manually.[2] (NLRB Case Handling Manual § 11301.2). From the outset, Employer was concerned that the union requested a mail ballot election in a bid to suppress the vote by making it more difficult for employees to cast their vote, and to enable the union to interfere with employees' free choice. The Regional Director, Region 31, ordered a mail ballot election. The union admits that, between the direction of election and the close of the mail ballot voting period, it made approximately 80 visits to employees' homes. (Ex. 6 to Request for Review ("RR"), pp 452:21 – 454:17).

The mail ballot voting period began on December 7, 2017, when the ballots were mailed, and ended on December 21, 2017, the last day to return the ballots. As of the election, there were 76 eligible voting employees.

After the ballots were mailed, the union targeted specific employees to visit at their homes – without invitation – when the mail ballots were expected to arrive. (Ex. 6 to RR, pp. 460:20 – 461:13). Nine employees complained about the visits to Daily Grill management, and eight of them volunteered written statements. (See Ex. 4 to RR, Employer's Offer of Proof in support of

[2] Employer also objected from the outset, and throughout this matter, that a mail ballot election would result in voter disenfranchisement, and enable the union to taint the election with coercion of the voting employees. Employer suspected that the union requested a mail ballot election for precisely that purpose, and argued as such in the RC Hearing. When the union confirmed that suspicion through its misconduct detailed here, Employer filed a Request for Review of the Regional Director's decision to order a mail ballot election. Although the Board denied the Request, Member Emmanuel noted, in a footnote to the order, that: ". . . in his view, this case illustrates why the Board should consider revising its policy in this area to restrict mail ballot elections to cases where a manual election is not feasible. Here, although the employees' varied work schedules made a manual ballot election difficult, scheduling several voting sessions should have reasonably addressed the problem. Instead, the mail ballot process left nearly 30 percent of eligible voters (22 of 76) uncounted, followed by the current litigation. In Member Emanuel's view, a manual ballot election, which was certainly feasible, would have yielded more complete and certain results."

Election objections, and Supporting Declarations.). The employees provided statements of their own volition, unsolicited by Employer, out of their own concern about the impropriety of the union's home visits.

The mail ballot election resulted in a 29 to 25 vote in favor of the union. Seven ballots were voided because the return envelopes were unsigned. Employer objected to the election on the grounds that the Regional Director improperly directed a mail ballot election, and that the union's home visits were coercive and interfered with the employees' free choice in the election. The Regional Director ordered an evidentiary hearing on the issue of the union's visits to the employees' homes. Following a three-day evidentiary hearing, in which each of the nine complaining employees testified, the Regional Director overruled Employer's objections and issued a Decision and Certification of Representative.

Employer requested review of the Regional Director's decision, and the Board issued an order granting review on November 20, 2018, finding that Employer's request "raises substantial issues warranting review with respect to whether union representatives' offers to help employees with their mail ballots, including offers to help employees fill out their mail ballots, constituted objectionable conduct."

III.

ARGUMENT

For the reasons discussed below, the union's offers to employees to "help" with their mail ballots through unwelcome home visits during the voting period constituted objectionable conduct that necessitates reversal of the Regional Director's Decision and Certification of Representative.

A. A Valid Election Requires "Laboratory Conditions" To Protect Employee's Rights to Vote Freely and Without Interference or Coercion.

The union's conduct is objectionable because it destroyed the "laboratory conditions" required in elections, and deprived employees of their right to vote free of interference or coercion by others. The rights involved in this case are not those of the Union or of the employer, but of the employees themselves. Their right to choose whether or not to be represented by the union, through a secret ballot election without interference, is fundamental, and must be preserved at all costs:

> The rights involved are those of the employees. The right is to join or not to join a union. The right is to be exercised free from any coercion from any quarter. … The right of employees to a choice and a choice through the secret ballot should not be lightly disregarded. … Anything less disparages the rights accorded employees under 7 of the Act and may visit the sins of the employer on the employees. The struggle is between the employer and the union ***but the right to select is that of the employees***.

N.L.R.B. v. Lake Butler Apparel Co., 392 F.2d 76, 82 (5th Cir. 1968) (emphasis added).

The "only consideration" for the Board when asked to invalidate an election "derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative." *Gen. Shoe Corp. (Nashville, Tenn.)*, 77 NLRB 124, 126 (1948). "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id.*

To ensure employees may vote in an atmosphere promoting their free choice, the election must be conducted under "laboratory conditions."

> The "laboratory conditions" test represents an ideal atmosphere in which a free choice may be made by employees, protected from interference by employer, union, Board agent, or other parties. As to any conduct objected to as interference, the critical Board determination is whether the employees were permitted to register a free choice.

N.L.R.B. v. McCarty Farms, Inc., 24 F.3d 725, 728 (5th Cir. 1994).

The Board must take into account all circumstances – including the closeness of the vote – to determine whether the union's conduct in this case corrupted the "laboratory conditions" necessary for a valid election. *Id*. In ascertaining whether an election was improperly conducted, "the key question is whether the procedures sufficed to protect the employees' right to choose." *Id.*; *Overnite Transp. Co. v. N.L.R.B.*, 104 F.3d 109, 112-113 (7th Cir. 1997). "An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative." *Gen. Shoe Corp. (Nashville, Tenn.)*, 77 NLRB 124, 126 (1948).

The controlling authority discussed above makes abundantly clear that an election tainted by interference by any party should be invalidated. The employee's right to free choice is paramount. When an election is conducted in an atmosphere where it is merely *improbable* that the employees' choice was not tainted by interference or coercion, the election should be set aside.

B. The Union's Conduct Destroyed the Laboratory Conditions and Infringed the Employee's Right to Vote Without Interference or Coercion.

Here, it is unquestionable that laboratory conditions did not exist in the mail ballot election. The union's characterization of its uninvited visits to employees' homes as innocuous offers to help is refuted by the employees' contemporaneous complaints and written statements, and their corroborating testimony at the evidentiary hearing.

That the employees voiced complaints about the union's conduct, without solicitation from Employer, is evidence in of itself that union's conduct went beyond mere "offers to help." These employees, whose rights are at stake in the election, felt coerced, pressured, and intimidated by

the union's visits. Several employees testified that they were upset, felt uncomfortable, and/or pressured by the union's home visits. (See Ex. 6 to RR, pp. 37:18-21 (Benjamin Acosta); 130:1 – 10, 153:13 – 17 (Kimberly Mendez); 242:3 – 15 (Kurt Mann); 260:10 – 25, 261:19-21 (Jose Palacios)). Stephanie Mendez feared opening her mailbox and receiving the mail ballots in front of the union representatives who were waiting for her at her home. (Ex. 6 to RR, pp. 371:7 – 372:8). Ashlynn Camberos had her ballot delivered to her mother's address to avoid receiving it at her home in the presence of the union. (Exhibit 6, pp. 167:18 – 168:13.). Kurt Mann testified that the union's demeanor was intimidating and forceful. (Ex. 6 to RR, pp. 223:23 – 224:16-25). He testified:

> [The union's demeanor is] . . . always a little intimidating, kind of; not mean, but definitely forceful, for sure . . . insisting upon not leaving until [he] could help them, or they were pretty forceful in telling me, like hey, we want to make this sure this happens, can you -- can we do it, can we do it now, can we -- you know, it was pretty forced. It was tough to not notice the -- they were trying to be nice about it, but at the same time, like, you could tell they weren't going to take no really, for an answer.

When asked whether he felt like the union made implied threats of retaliation, Mr. Mann stated as follows:

> It did feel like I was being kind of given not too many options whether -- you know what I mean -- like, to take it or not. I wasn't really given -- it did feel a little pressured and like they wouldn't leave if I didn't give them the ballot or take the ballot with them or have them help me fill it out. They definitely were insisting and making it seem like they weren't going to take no for an answer almost.

(Ex. 6 to RR, p. 242:9-15).

Multiple employees testified that the union further crossed the line beyond merely offering to help, including instructions and pressure on how to vote. Stephanie Mendez, Kurt Mann, and Macey Sheets each testified that the union representatives who visited them attempted to "help" them *complete* their ballots, or tried to convince them to open and complete their ballots in the union's

presence. (Ex. 6 to RR, pp. 36:21 – 37:10; 143:12 – 144:11; 222:24-25; 317:20-25). The union clearly calculated this tactic to intimidate and pressure the employees, and usurp their free choice.

Importantly, the union's conduct *actually affected* the employees' votes. The union's home visits created fear in the employees about the anonymity of their ballots, and not just among those employees that testified. (See Ex. 6 to RR, Testimony of Macey Sheets, Kurt Mann, and Kimberly Mendez, pp. 153:20 – 154:2; 224:16 – 225:22; 320:3-18; 333:9-22). Lucas Chim testified that at least 20 of his co-workers discussed the home visits and stated that they were not going to vote because the union members were going to their homes. (Ex 6 to RR, pp. 119:23 – 120:14). Ultimately, 15 of the 76 eligible employees did not have a mail ballot present at the count. Seven employees who submitted ballots had their ballots voided because they did not sign the outer envelope. Macy Sheets did not sign her ballot envelope because she feared her vote would not be kept anonymous. (Statement of Macey Sheets, Ex. 4 to RR (attached therein as Exhibit L); Ex. 6 to RR, p. 332:18 – 333:18). Daniel Guitron did not sign his mail ballot envelope because "it was supposed to be anonymous." (Statement of Daniel Guitron, Ex. 4 to RR (attached therein as Exhibit K)). Francisco Davila did not sign his mail ballot envelope because "it was suppose to be anonymous." (Statement of Francisco Davila, Ex. 4 to RR (attached therein to Supplemental Offer of Proof as Exhibit D)).

Clearly, the union's conduct had a substantial effect on the employees during the critical voting period, as the union intended, thereby destroying the "laboratory conditions" required for a valid election. Under the conditions created by the union's misconduct, it was not only *improbable* that employees could not exercise their free choice, it was certain that they could not.

C. The Union's Election-Period Electioneering Must be Prohibited Just As It Would Have Been In a Manual Election.

The union's blatant electioneering during the voting period would have been strictly prohibited during a manual election. A mail ballot election should be no different. In a manual election, electioneering while the employees are waiting to vote is prohibited because such conduct undermines the free choice of the employees voting:

> Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations. ***The final minutes before an employee casts his vote should be his own, as free from interference as possible***. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 NLRB 362, 363 (1968) (emphasis added; "[S]ustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election."); *see also Claussen Baking Co.*, 134 NLRB 111, 112 (1961) (invalidating election where electioneering by employer occurred within 15 feet of the polls for about 15 minutes; "It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its elections. In furtherance of this responsibility the Board prohibits electioneering at or near the polls.").

When a party objects to election conduct, the question before the Board is whether "the electioneering activity substantially impaired the exercise of free choice so as to require the holding of a new election." *Overnite Transp. Co., supra*, 104 F.3d at 112. Two incidents were discussed by the court in *McCarty Farms*. In one, a pro-union representative approached employees who

were in line to vote and shouted at one of the employees who was wearing a "Vote No" sticker. Although he did not exactly threaten the employee, the court overruled the Board's findings: first, that the union representative was not trying to pick a fight; and second, ***that there was no evidence of fear among other employees sufficient to destroy the atmosphere of free choice for the election***.

> We cannot agree with Board's finding. We must reiterate that Jones's conduct took place in the voting line, moments before voting, and that some 8 to 14 voters observed and heard the confrontation. Furthermore, … we are influenced to disagree with the Board because its pronouncements over the decades have insisted upon "laboratory conditions" for voting and the facts and reasonable inferences drawn from them show that the conditions were more typical of a picket line than a voting booth. … ***The seriousness of the impact of the altercation was evidenced by the spread of the word of the incident to other employees in the plant***.

McCarty Farms, supra, 24 F.3d at 728 (emphasis added).

In a mail ballot election, the employees' homes during the voting period are akin to the voting line in a manual election. The importance of laboratory conditions is no less significant in a mail ballot election. In fact, that necessity is perhaps more pronounced, since there is no neutral monitor present to ensure that no party exerts improper pressure on the voters. Unquestionably, the union's conduct in this case – where it cajoled and pressured employees who had their ballots in hand as they prepared to complete their ballots – would be prohibited in a manual election based on the authorities cited herein. (See, e.g., *Milchem, Inc.*, 170 NLRB 362, 363 (1968), holding: "[S]ustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.").

The court in *McCarty Farms* also considered an incident in which a union representative said things like, "Do the right thing," and "You better vote yes" to employees both inside and

waiting to enter the voting room, and challenged employees waiting to enter the voting room as to why they were not wearing their union t-shirts. *Id.* at 730-731. The court held that the company had established a *prima facie* case that demanded review of whether "the fact that some of … the conduct was directed at voters in line to vote within and without the voting room, and the fact that the balance of Hart's conduct was directed at employees in areas that the Board Agent considered sensitive," indicated that the conduct could have "disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election." *Id*.

In *N.L.R.B. v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111, 112-113 (5th Cir. 1981), two former employees wearing "Vote Teamsters" signs on their hats and enlarged reproductions of the ballot with an "X" marked in the "Yes" box pinned on their shirts, positioned themselves in the parking lot where the line of waiting voters formed. As the line of voters passed them by, both men urged the employees to vote for the union and repeatedly gestured to the "Yes" box on the ballot pinned to their shirt. The court held that this electioneering was prohibited pursuant to the Board's own rules, and therefore refused to enforce the Board's bargaining order, citing *Claussen Baking, supra*.

When a party engages in election misconduct, the Board will overturn an election if the conduct "interfered with the employees' exercise of free choice to such an extent that [it] materially affected the results of the election." *NLRB v. Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir.1991); *McCarty Farms, supra*, 24 F.3d at 728. The union's conduct in this case plainly tipped the election in its favor, and therefore the election must be set aside. No fewer than nine employees approached the employer – without any solicitation whatsoever – to complain about the union's conduct. They later testified that they were sufficiently intimidated or annoyed by the union that they declined to place their signatures on the envelopes for fear of revealing their votes to the

union. *Cf. McCarty, supra* ("The seriousness of the impact of the altercation was evidenced by the spread of the word of the incident to other employees in the plant.").

The fact that nine employees complained strongly suggests that many more felt the same coercive effects. *See Steak House Meat Co.*, 206 NLRB 28, 29 (1973) (threat by employee against only one other employee held sufficient to induce fear in entire voting population; "However, the fact that the threats were directed at only one employee does not necessarily lead to the conclusion that no general atmosphere of fear and coercion existed."). Indeed, the direct evidence in this case proves that a general atmosphere of fear and intimidation permeated the Restaurant due to the union's conduct. Many of the employees who testified described the effect of the union's behavior on their colleagues. The home visits were an ongoing topic of discussion in the workplace, and caused tension amongst the staff. Ashlynn Camberos testified:

> . . . it felt like there was a lot of tension at work with certain people, where they weren't doing certain things of their job and that would affect me, because they were backing up from helping me with tables when they had to do their jobs.

(Ex. 6 to RR, pp. 212:1-14).

Macey Sheets testified that she:

> . . . didn't want to have like any like problems with any coworkers. So, like – if anyone would say anything or talk about it, I just kept my mouth shut. And I didn't want anyone to know what I voted.

(Ex. 6 to RR, p. 320:14-20).

As Lucas Chim testified, at least 20 of his colleagues discussed the home visits and stated that they were not going to vote because the union members were going to their homes. (Ex 6 to RR, pp. 119:23 – 120:14).

All of this evidence establishes that the union's conduct had a direct and material influence on the outcome of the vote. This is the critical inquiry.

> We are aware that, in many instances, assessing the effect of a particular action on the electorate could be a difficult, if not impossible, task. This is because detecting the subjective reaction of employees to electioneering requires an expedition into the thought processes of the electorate, a journey that administrators and courts are ill-equipped to make. To eliminate this invitation to speculate, the Board should not attempt to plumb the subconscious. Rather, the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the voting. If the challenged action had a tendency to influence the outcome of the election, then the election should be invalidated.

NLRB v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978). *See also Exeter 1 A Ltd. P'ship v. N.L.R.B.*, 596 F.2d 1280, 1282-1283 (5th Cir. 1979) (threats by union representative against management personnel sufficient to influence election where employees might have taken the threats to apply to them if they did not vote in the union. "Simply put, this is no way to run an election."); *Home Town Foods, Inc. v. N. L. R. B.*, 416 F.2d 392, 395-396 (5th Cir. 1969) (denying enforcement due to pre-election misconduct by union).

Here, the Board need not attempt to "plumb the subconscious" to determine whether the union's conduct had a tendency to influence the outcome of the election. There is direct evidence, through testimony of those directly affected by it, that it materially changed the outcome. As the court stated in *Home Town Foods*: "this is no way to run an election." The union's conduct would certainly not be tolerated even for a moment in a manual election, and there is no justification for allowing it in a mail ballot election, just as there is no authority or rationale for relaxing the "laboratory conditions" standard in a mail ballot election. The union stole this election from the employees through pressure, intimidation and coercion. The union engaged in this conduct with the intent of materially changing the outcome of the election, and the union's plan worked.

IV.
CONCLUSION

Based on the foregoing, Employer respectfully requests that the Board reverse the Regional Director's Decision and Certification of Election.

Dated: 12/14/2018

Respectfully Submitted,

STOKES WAGNER

_/s/ *Adam L. Parry*_____
Diana Dowell
Adam L. Parry
555 West 5th Street, 35th Floor
Los Angeles, CA 90013

ATTORNEYS FOR GRILL CONCEPTS SERVICES, INC. d/b/a THE DAILY GRILL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITE HERE - LOCAL 11

And

Case 31-RC-209589

Grill Concepts Services, Inc. d/b/a The Daily Grill

PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of eighteen years and not a party to the within action; my business address is 600 W. Broadway Ste. 910 San Diego, CA 92101.

On December 14, 2018 I caused the following document(s) to be served:

- **BRIEF IN SUPPORT OF REVIEW OF REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE**
- **EXHIBITS IN SUPPORT OF BRIEF IN SUPPORT OF REVIEW OF REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE**

on the interested party below in this action by filing the enclosed.

☐ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on December 14, 2018, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Perla D. Cuevas
STOKES WAGNER
600 W. Broadway Ste. 910
San Diego, CA 92101